SUPREME COURT U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 753

JULIUS H. MINER, as Judge of the Circuit Court of Cook County, and PAUL WILLER PETERSEN,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES, a mutual insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, EARL T. DEMOE, ARTHUR J. LINDSLEY, JAMES M. STREET, FRED B. AHARA, ANDREW BLOOMFIELD, W. H. FUNKE, LEE F. WARD and PAUL E. KELLER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petition for Rehearing.

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Petition for Rehearing.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully submit that in denying their petition for certiorari this honorable Court has failed to give sufficient consideration to the effect of the decision of which review is sought and the importance of the questions involved.

Incorporated in Illinois alone there are three mutual life insurance companies on a legal reserve basis, twenty-five mutual casualty companies, nine mutual hospital insurance companies, five assessment accident and health insurance companies and twenty-five assessment life insurance companies. In the year ended December 31, 1943 the three mutual reserve life insurance companies had premium income of $7,719,307.13; the twenty-five mutual casualty companies, of $12,536,256.40; the five assessment accident and health companies, of $2,524,303.17 and the twenty-five assessment life insurance companies of $33,771,742.24.

As the policyholders in these mutual companies are widely scattered, a small group is able to perpetuate themselves as officers and directors of the companies through the proxy system. With such means of self perpetuation that small group is able, too frequently, to operate the company for its own selfish interests for the policyholders are at its mercy. The dangers inherent in that condition were pointed out by the Circuit Court of Appeals for the Seventh Circuit, in *Moulton* v. *Field*, 179 Fed. 673, 675 (Cert. Den. 219 U. S. 586) wherein the Court said:

> "Mutual life insurance companies differ radically from ordinary industrial enterprises. Every customer by the act of purchasing what the company has to sell becomes an owner of the business. Because policy holders are necessarily numerous, widely scattered, unacquainted with one another, each owning too small an interest in the business to justify the expense of long travel to the owners' annual meeting, the proxy system seems inevitable. * * If such a self-perpetuating autocracy is not unlawful in its very nature (and if not, it might be well that the taking of proxies in mutual life insurance companies by officers, directors or employees should be prohibited by statute), at least the centering of the electorate and the benefits of the election in one person or group

> of persons raises the highest obligation of good faith and creates the burden of establishing very clearly the fairness and honesty of any challenged benefit."

True, if regulatory statutes are violated the company, itself, is subject to disciplinary action, at the behest of a state's Insurance Department *if that Department sees fit to act.* If, however, the state's officials do not see fit to act, or if the dominating group is able to stay within the letter of the statutes, they are free to serve their own selfish interests without hindrance, unless the courts are open to the policyholders to seek, on behalf of the company, the equitable relief which is granted to stockholders of other companies under like conditions.

In the instant case it is admitted that the Director of Insurance of the State of Illinois has known since 1927 (Rec. 4, 13, 35) of the existence of a contract which the individual respondents caused this insurance company to enter into with themselves, whereby they receive, under the guise of a fictional agency, what in effect are enormous annual gratuities from the company. In fact, the Department's own records disclose that the individual respondents are legally incapable of rendering the service of procuring business for the company, which is the purported basis for the compensation, for neither the Agency, nor any member of it, has been licensed by the Department as an insurance agency, broker, solicitor or agent (R. 13, 14). Despite this knowledge, the Department of Insurance has, during all these years, taken no action to alleviate this condition.

Such failure of the Department to act can be attributed to only two causes; either there existed no violation of statutory provisions which would enable it to act, or there was a disinclination to act despite such violations.

The individual respondents here, as pointed out in petitioners' Reply Brief (pages 9, 10) have not only made every effort to stay within the letter (but not the intent) of the statutes but also have used every means within their power to keep secret from the policy holders and the Department of Insurance the provisions of the Agency contract. Shortly after the State of Illinois enacted the Insurance Code and provided therein that no *exclusive* agency contract may be made unless it is filed with and approved by the Director of Insurance (1943 Ill. Rev. Stats. Cha. 73, Sec. 753), these respondents amended their contract by eliminating the exclusive feature (R. 12) although, in fact, the Agency continued to be the sole recipient of the twenty per cent of net premiums. In this proceeding they refused to comply with an order of court to produce that contract for inspection (R. 25, 26).

If, in fact, management, while not violating the letter of any regulatory statute, nevertheless adopts a policy which is unconscionable and injurious to the policyholders, there should be some forum which is empowered to grant relief. If statutory prohibitions have been violated, but the state official charged with their enforcement has not seen fit to act, and under the law of that state, as here, a writ of mandamus is not available to require him to act, then again there should be a remedy available to the persons injured.

If it be conceded, for purposes of argument, that the Director of Insurance lacks the power to act for lack of any violation of the letter of the statutes, yet the complaint filed herein, the allegations of which must be taken to be true, discloses that a condition requiring redress exists. The effect of the decision of the Supreme Court of Illinois is to deprive the policyholders of all remedy for that condition without a hearing. Such a decision is not in accord with applicable decisions of this Court.

Ohio Bell Telephone Co. v. *Public Utilities Commission,* 301 U. S. 292, 304; *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 69; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 682.

If statute law has been violated, the policyholders are equally remediless as there exists no method of forcing the Department to act. The Illinois Insurance Code provides none and the Illinois decisions hold that mandamus will not lie against the Director. (Petition for Certiorari pages 26, 27).

Respondents have argued at great length that Section 201 of the Illinois Insurance Code Ill. Rev. Statutes (1943), Chap. 73, Sec. 813 enunciates a policy on the part of the State of Illinois to place in the hands of the Director of Insurance, alone, all proceedings, not only against insurance companies but against their officers and directors. In this argument they rely heavily upon the interpretation of a similar New York statute in the case of *Swan* v. *Mutual Reserve Fund Life Ins. Assoc.,* 155 N. Y. 9, 49 N. E. 258.

Not only will a cursory reading of Section 201 of the Illinois Insurance Code disclose that no such policy is thereby enunciated but the New York courts themselves, in a subsequent case, specifically held that the New York statute does not prohibit a suit by a policy holder to recover, for his company, funds wrongfully withdrawn from it by its officers and directors. *Young* v. *Equitable Life Assurance Society of the United States,* 99 N. Y. Supp. 446, 49 Misc. 347; affirmed 98 N. Y. Supp. 1052, 116 App. Div. 911.

In that case the court said, 99 N. Y. Supp. 452:

> "If this suit is successful, all its benefits will go to the corporation, and no burden will be imposed upon it. In reality, the corporation is the plaintiff and its

> directors the defendants. The nominal plaintiff is the mere instigator of the action. The only injunction prayed for is one restraining the commission of waste by the Society's directors. This will not interfere with the Society's business, except to aid it."

That language is precisely applicable to the instant case as the Illinois statute (sec. 201) was taken from the New York statute almost verbatim, except that the New York statute prohibits accounting suits against corporations while the Illinois statute has been amended to eliminate that prohibition. There has not been cited to this Court a single decision in any state, having a similar statute, which prohibits relief in a suit such as petitioner Petersen's.

The decision of the Illinois Supreme Court, of which review is sought, denies due process by determining that an accounting to the company by its officers and directors would, as a matter of law, constitute an interference with the prosecution of the company's business although whether that would be the result is necessarily a question of fact. The result of that decision is also to deprive the policyholders of the Company of every remedy for the continuing wrongs being committed against them by their fiduciaries. Both of these consequences constitute a violation of the Fourteenth Amendment. *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 158.

If that decision remains unreversed, those few individuals who control the operations of Illinois mutual insurance companies need but follow the pattern created by the individual respondents here, to be able, unrestrained by the power of any court, to exploit their members and use their funds for their own ends.

The decision of the Illinois Supreme Court is a negation of the elementary rule of law that for every wrong there is a remedy for it is a determination, without a

hearing, that the policyholders, who are the only persons able and willing to seek that remedy, may not have access to the courts to obtain it, a right guaranteed them by the Constitution of the United States.

CONCLUSION.

For the reasons above stated, petitioners respectfully submit that a rehearing be granted and that their petition for certiorari be allowed.

Respectfully submitted,

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CERTIFICATE.

I, Charles W. Stiefel, Jr., one of the attorneys for petitioners in the above cause, hereby certify that the foregoing petition for rehearing is filed in good faith and not for purpose of delay.

CHARLES W. STIEFEL, JR.